

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SCOTT MICHAEL CONWAY,  
Plaintiff,

v.

J. DIAS, et. al.,  
Defendants.

Case No. [16-cv-0082-TEH](#)

ORDER OF SERVICE

Plaintiff, a detainee at Santa Clara County Jail, proceeds with a pro se civil rights action under 42 U.S.C. § 1983. He has paid the filing fee.

I

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint "is frivolous, malicious, or fails to state a claim upon which relief may be granted," or "seeks monetary relief from a defendant who is immune from such relief." Id. § 1915A(b). Pleadings filed by pro se litigants, however, must be liberally construed. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010); *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1990).

1 To state a claim under 42 U.S.C. § 1983, a plaintiff must  
2 allege two essential elements: (1) that a right secured by the  
3 Constitution or laws of the United States was violated, and (2)  
4 that the alleged violation was committed by a person acting under  
5 the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988).

6 II

7 Plaintiff states that one correctional officer retaliated  
8 against him and several officers assaulted him.

9 "Within the prison context, a viable claim of First  
10 Amendment retaliation entails five basic elements: (1) An  
11 assertion that a state actor took some adverse action against an  
12 inmate (2) because of (3) that prisoner's protected conduct, and  
13 that such action (4) chilled the inmate's exercise of his First  
14 Amendment rights, and (5) the action did not reasonably advance a  
15 legitimate correctional goal." Rhodes v. Robinson, 408 F.3d 559,  
16 567-68 (9th Cir. 2005) (footnote omitted). Accord Pratt v.  
17 Rowland, 65 F.3d 802, 806 (9th Cir. 1995) (prisoner suing prison  
18 officials under § 1983 for retaliation must allege that he was  
19 retaliated against for exercising his constitutional rights and  
20 that the retaliatory action did not advance legitimate  
21 penological goals, such as preserving institutional order and  
22 discipline); Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994)  
23 (per curiam) (same); Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir.  
24 1985) (contention that actions "arbitrary and capricious"  
25 sufficient to allege retaliation).

26 The Due Process Clause of the Fourteenth Amendment protects  
27  
28

a post-arraignment pretrial detainee<sup>1</sup> from the use of excessive force that amounts to punishment. Graham v. Connor, 490 U.S. 386, 395 n.10 (1989) (citing Bell v. Wolfish, 441 U.S. 520, 535-39 (1979)); cf. Pierce v. Multnomah County, Oregon, 76 F.3d 1032, 1043 (9th Cir. 1996) (Fourth Amendment reasonableness standard applies to allegations of use of excessive force against pre-arraignment detainee). To prevail under 42 U.S.C. section 1983, a pretrial detainee must show only that the "force purposely or knowingly used against him was objectively unreasonable." Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015). "A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." Id. "A court (judge or jury) cannot apply this standard mechanically." Id. "[O]bjective reasonableness turns on the 'facts and circumstances of each particular case.'" Id. (quoting Graham v. Connor, 490 U.S. at 396). A non-exhaustive list of considerations that may bear on the reasonableness of the force used include "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting." Id.

Plaintiff alleges that Defendant Alvarez threatened him if Plaintiff did not address other inmates regarding their

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<sup>1</sup> Plaintiff appears to be a pretrial detainee. If he is a convicted prisoner then the Eighth Amendment applies.

misconduct. Later Alvarez strip-searched Plaintiff and provided clothes that were too small because Plaintiff failed to act upon Alvarez's request. Liberally construed, this states a cognizable claim of retaliation.

Plaintiff also alleges that Alvarez and several other officers assaulted him by stomping on his feet, punching him in the face, and hitting him in the area where he just had appendix surgery. Plaintiff states he suffered excruciating pain. Liberally construed this states a cognizable claim of excessive force against these officers.

### III

For the foregoing reasons, the Court hereby orders as follows:

1. The Clerk of the Court shall issue summons and the United States Marshal shall serve, without prepayment of fees, a copy of the complaint (Docket No. 1), and a copy of this order upon the following Defendants at Santa Clara County Jail: Correctional Officer ("CO") J. Dias, CO Tejeda #10770, CO Ruban #10766, CO Alvarez, Sgt. Pham #1714, and CO Duenas.

2. In order to expedite the resolution of this case, the Court orders as follows:

a. No later than 91 days from the date of service, Defendants shall file a motion for summary judgment or other dispositive motion. The motion shall be supported by adequate factual documentation and shall conform in all respects to Federal Rule of Civil Procedure 56, and shall include as exhibits all records and incident reports stemming from the events at issue. If Defendant is of the opinion that this case cannot be

1 resolved by summary judgment, he shall so inform the Court prior  
2 to the date his summary judgment motion is due. All papers filed  
3 with the Court shall be promptly served on the plaintiff.

4 b. At the time the dispositive motion is served,  
5 Defendants shall also serve, on a separate paper, the appropriate  
6 notice or notices required by Rand v. Rowland, 154 F.3d 952, 953-  
7 954 (9th Cir. 1998) (en banc), and Wyatt v. Terhune, 315 F.3d  
8 1108, 1120 n. 4 (9th Cir. 2003). See Woods v. Carey, 684 F.3d  
9 934, 940-941 (9th Cir. 2012) (Rand and Wyatt notices must be  
10 given at the time motion for summary judgment or motion to  
11 dismiss for nonexhaustion is filed, not earlier); Rand at 960  
12 (separate paper requirement).

13 c. Plaintiff's opposition to the dispositive motion,  
14 if any, shall be filed with the Court and served upon Defendants  
15 no later than thirty days from the date the motion was served  
16 upon him. Plaintiff must read the attached page headed "NOTICE -  
17 - WARNING," which is provided to him pursuant to Rand v. Rowland,  
18 154 F.3d 952, 953-954 (9th Cir. 1998) (en banc), and Klinge v.  
19 Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988).

20 If Defendants file a motion for summary judgment claiming  
21 that Plaintiff failed to exhaust his available administrative  
22 remedies as required by 42 U.S.C. § 1997e(a), plaintiff should  
23 take note of the attached page headed "NOTICE -- WARNING  
24 (EXHAUSTION)," which is provided to him as required by Wyatt v.  
25 Terhune, 315 F.3d 1108, 1120 n. 4 (9th Cir. 2003).

26 d. If Defendant wishes to file a reply brief, he shall  
27 do so no later than fifteen days after the opposition is served  
28 upon him.

1 e. The motion shall be deemed submitted as of the date  
2 the reply brief is due. No hearing will be held on the motion  
3 unless the court so orders at a later date.

4 3. All communications by Plaintiff with the court must be  
5 served on defendant, or defendant's counsel once counsel has been  
6 designated, by mailing a true copy of the document to defendants  
7 or defendants' counsel.

8 4. Discovery may be taken in accordance with the Federal  
9 Rules of Civil Procedure. No further court order under Federal  
10 Rule of Civil Procedure 30(a)(2) is required before the parties  
11 may conduct discovery.

12 5. It is Plaintiff's responsibility to prosecute this case.  
13 Plaintiff must keep the court informed of any change of address  
14 by filing a separate paper with the clerk headed "Notice of  
15 Change of Address." He also must comply with the court's orders  
16 in a timely fashion. Failure to do so may result in the  
17 dismissal of this action for failure to prosecute pursuant to  
18 Federal Rule of Civil Procedure 41(b).

19 IT IS SO ORDERED.

20 Dated: 02/17/2016



THELTON E. HENDERSON  
United States District Judge

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## NOTICE -- WARNING (SUMMARY JUDGMENT)

If defendants move for summary judgment, they are seeking to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.

## NOTICE -- WARNING (EXHAUSTION)

If defendants file a motion for summary judgment for failure to exhaust, they are seeking to have your case dismissed. If the motion is granted it will end your case.

You have the right to present any evidence you may have which tends to show that you did exhaust your administrative remedies. Such evidence may be in the form of declarations (statements signed under penalty of perjury) or authenticated documents, that is, documents accompanied by a declaration showing where they came from and why they are authentic, or other sworn papers, such as answers to interrogatories or depositions. If defendants file a motion for summary judgment for failure to exhaust and it is granted, your case will be dismissed and there will be no trial.